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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ETOPIA EVANS, *et al.*,

Plaintiffs,

v.

ARIZONA CARDINALS FOOTBALL CLUB, LLC, *et al.*,

Defendants.

Civil Case No.:3:16-CV-01030-WHA

REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT AND FOR SUMMARY JUDGMENT ON THE INDIVIDUAL CLAIMS OF CERTAIN PLAINTIFFS

Date: April 27, 2017
Time: 8:00 a.m.
Dept: Courtroom 8
Judge: Honorable William Alsup

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INTRODUCTION

In its February 3, 2017 Order, the Court set out the well-established standard for pleading claims of affirmative misrepresentation and concealment; it explained, through careful evaluation of each plaintiff's claims, what does and does not pass muster under that standard; and it then gave plaintiffs a final opportunity to plead their "best case." *See* Dkt. No. 168 at 10-17, 19 ("February 3 Order"). The Court also confirmed that its prior denial of a motion to dismiss on statute of limitations grounds had hinged on plaintiffs' allegation – which remained subject to proof – that their underlying injuries were latent and not discoverable until 2014. *Id.* at 8, 20; *see also* Dkt. No. 89 at 7-8.

Plaintiffs have disregarded the Court's direction in every respect. Their Opposition does not dispute defendants' detailed, plaintiff-by-plaintiff showing that the SAC does not come close to filling the pleading gaps identified in the February 3 Order. Instead, ignoring both the Court's Order and the clearly established law in the Ninth Circuit, plaintiffs argue that they have no obligation to plead their fraud claims with particularity.

Plaintiffs take a similar approach on the summary judgment issues. They effectively concede that few, if any, of their alleged injuries were actually "latent." To the contrary, almost every plaintiff was fully aware long ago of all the *facts* on which his claims are based. Plaintiffs argue instead that their untimeliness should be excused because they did not identify their *legal theories* until March 2014. That argument cannot be reconciled with the governing law.

In addition to misstating the law on both Rule 9(b) and the statute of limitations, plaintiffs' opposition is fundamentally at odds with itself. In seeking to avoid summary judgment, plaintiffs offer the remarkable assertion that "the injuries at issue in this case are not the injuries that Plaintiffs sustained on the field ***as a result of playing football***…." Opp. at 20 (emphasis in original). Yet, in seeking to avoid dismissal, the Opposition explicitly describes plaintiffs' injuries as football injuries. *See, e.g.*, Opp. at 6-7.

More generally, plaintiffs are unable to plead facts that support their preferred theory that they were injured as a result of misrepresentations and concealment of the risks of "side effects" associated with medications. With a single exception (Carreker), the Court found that the prior complaint had failed to allege facts that would support a claim based on that theory. The SAC does no better. And

while the Court held that a handful of other claims were sufficiently pled on a different theory – i.e., that certain plaintiffs were, on specific occasions, allegedly pressured while injured to play in games and suffered new or aggravated injuries as a result – *those* injuries were not the result of undisclosed "side effects" from medications. To the contrary, in those instances plaintiffs allege that the medications worked as intended, treating plaintiffs' pain effectively and enabling them to continue to play. In the few instances in which plaintiffs have alleged facts that would support claims on *this* theory, the statute of limitations bars them.

Stripping away the claims for which necessary facts are not pled and those that are plainly barred by the statute of limitations, there is very little left of this case. As an aid to the Court, Exhibit A to this Reply summarizes the briefing status of each of the individual claims presented in the SAC.

ARGUMENT

I. The Claims That Were Dismissed Previously Should Be Dismissed Again.

A. Plaintiffs Do Not Contest Defendants' Detailed Showing That Their Claims Are Inadequately Pled.

Plaintiffs' Opposition makes no effort to contest any element of defendants' detailed showing concerning *specific* pleading deficiencies in the SAC.

Claims Against Defendants as to Which a Plaintiff Has Offered No Allegations. Although the SAC asserts that each claim is brought by "All Plaintiffs Against All Defendants" (SAC pp. 114, 119), plaintiffs now concede that the SAC actually asserts only 38 or 39 distinct claims, each by an individual plaintiff against one or more of his former club employers.[1] Plaintiffs do not contest defendants' argument (Mot. at 14) that, following dismissal of their conspiracy allegation, each plaintiff may sue only the particular clubs that are alleged to have committed wrongdoing that injured him. And plaintiffs offer no response to defendants' showing that they have alleged no claims at all against the Cleveland Browns. *See* Mot. at 11 & n.7.

[1] Exhibit 1 to the Opposition, which purports to list all of plaintiffs' claims, identifies only 38 claims, omitting plaintiff Evans' claim against the Minnesota Vikings. It is unclear whether this omission was intentional.

Previously Dismissed Claims That Were Not Amended in the SAC. Plaintiffs also do not dispute that, for the twelve claims addressed at pp. 6-9 and Exhibit B to the Motion, the allegations of the SAC are essentially identical to those of the FAC, which the Court has already found inadequate. The Opposition only mentions one of these twelve claims (that of plaintiff Goode) and then only in summary fashion (Opp. at 6), with no suggestion that Goode's allegations in the SAC differ from his allegations in the FAC. Plaintiffs have thus effectively conceded that these twelve claims (identified in Group 1 of Exhibit A) are again subject to dismissal.

Claims That Were Purportedly Amended in the SAC. As to the remaining seventeen claims that defendants challenge under Rule 12, plaintiffs make no effort to argue that their purported amendments cure any (much less all) of the continuing defects that defendants have identified. *See* Mot. at 9-14. Many of these claims are not even mentioned in the thirty-page Opposition; the remainder are referred to in only summary terms, with no effort to confront and address the identified defects.

For example, defendants' Motion pointed out that the only new allegations offered by plaintiff Etopia Evans (the widow of Charles Evans) are (1) that someone on the Baltimore Ravens staff gave him medications after he retired as a player; and (2) that a Minnesota Vikings doctor once gave *her* an antibiotic without a prescription. Mot. at 9-10. Plaintiffs' passing mention of Evans' pleading (Opp. at 6) does not dispute that these are the only new allegations offered to support her claims against the Ravens and Vikings; nor do plaintiffs argue that these obviously irrelevant allegations cure the previous defects in the pleading of those claims.

Similarly, the discussion of plaintiff Lofton's claim against the Arizona Cardinals (Opp. at 7) does not attempt to dispute defendants' showing that the only new allegation is a general observation that coaches encouraged players to "tough through it." Mot. at 13 (citing SAC ¶ 246). Plaintiffs do not argue that this is sufficient to cure the previously recognized deficiencies in this claim.

Nor do the Opposition's abbreviated discussions of other claims make any effort to address the specific deficiencies identified in the Motion. For example, plaintiffs merely repeat Sadowski's boilerplate allegations against the Cincinnati Bengals, making no effort to answer defendants' showing that Sadowski has failed to identify any occasion when he was pressured to play but should not have played, any occasion when he received substandard treatment for any injury, or any other particularized

basis for a claim. *Compare* Mot. at 13 *with* Opp. at 7. The same is true for the claims of other plaintiffs. *Compare, e.g.*, Mot. at 12 (discussing specific defects in plaintiff King's allegations against the Buffalo Bills) *with* Opp. at 7 (describing King's claim against the Bills without addressing any of those issues); Mot. at 13 (pointing out that plaintiff Ashmore's amended allegations against the Los Angeles Rams are not materially different from his allegations in the FAC that were rejected by the Court) *with* Opp. at 6 (briefly describing Ashmore's claim without addressing this point).

For several plaintiffs, the Opposition discusses only claims that defendants have not challenged under Rule 12. For example, plaintiff Graham has asserted claims against five different defendants. In its February 3 Order, the Court found sufficiently pled only his claim against the Chargers; his other four claims were dismissed. Defendants have described in detail the continuing defects in those claims as restated in the SAC. *See* Mot. at 10-11. But the Opposition (at 6-7) discusses only Graham's claim against the Chargers, saying nothing about his claims against the other four clubs.[2]

Many of the purportedly amended claims are not discussed in the Opposition at all. *See* Exhibit A. Some – but not all – of these claims are listed on page 11 of the Opposition as claims plaintiffs assert are sufficiently pled, but that list is not accompanied by any explanation of why plaintiffs contend that these claims are sufficiently pled. In short, plaintiffs have offered no meaningful defense of their pleading of any of these claims.

B. Plaintiffs' Claims Are Inadequately Pled Under Any Standard.

Instead of addressing the specific pleading defects identified in defendants' Motion, the Opposition argues at length that the Court applied an incorrect standard to their concealment claim and that the Motion, which seeks dismissal of largely identical allegations on identical grounds, therefore does so as well. Plaintiffs argue that their concealment claims should be subject to a "relaxed" standard

[2] The Opposition takes the same approach with the claims of plaintiffs Harris, Killings, Massey, and Wunsch, discussing only the individual claims of those plaintiffs for which pleading sufficiency is not at issue and making no effort to respond to defendants' showing concerning deficiencies in those plaintiffs' claims against other clubs. *Compare* Mot. at 8-9, 11-13 *with* Opp. at 7-8.

that, as they describe it, would require less than is required under Rule 8, much less Rule 9(b). Ninth Circuit law does not support this argument.[3]

There can be no serious question that the Court applied the correct pleading standard in the February 3 Order. It is black letter law in the Ninth Circuit that both claims of affirmative misrepresentation *and* claims of fraud through "omission" are subject to the enhanced pleading requirements of Fed. R. Civ. P. 9(b). *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-27 (9th Cir. 2009) (any fraud claim, including one for "nondisclosure," must be pled with particularity under Rule 9(b)); *Bias v. Wells Fargo & Co.*, 942 F. Supp. 2d 915, 935 (N.D. Cal. 2013) (same); *see also* Feb. 3 Order at 11 (citing *Kearns*).

Plaintiffs argue that their concealment claim is nonetheless subject to a "less exacting" pleading standard. (Opp. at 4). But none of their cited cases comes close to suggesting that conclusory allegations of the kind offered here are sufficient. Some courts – including this Court – have recognized that for claims involving omissions, some elements may need to be pled in a different way than would be the case for claims of affirmative misrepresentation. *See Washington v. Baenziger*, 673 F. Supp. 1478, 1482 (N.D. Cal. 1987); *see also Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1099 (N.D. Cal. 2007) (observing that, although Rule 9(b) applies to an omission claim, it may not be possible to plead some elements "as precisely"). That is not because Rule 9(b) is inapplicable; it is because in pleading an omission, which is a "failure to act" rather than "an act," specifics such as the "time" of the omission may not be subject to precise determination. *Washington*, 496 F. Supp. at 1482. Nothing in the case law excuses a plaintiff from pleading with particularity facts that *are* knowable and necessary to his claim, such as the specific content of the information he contends should have been disclosed, the factual context in which the omission occurred, and facts establishing a causal link between the omission and his alleged injury, including the impact of the omission on his own conduct.

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[3] Plaintiffs begin (Opp. at 1) by criticizing defendants' reference to the Court's caution that the SAC should plead their "best case." *See* Feb. 3 Order at 19. The Court's caution obviously did not suggest a heightened pleading standard for the SAC. Rather, it appropriately served notice that, with plaintiffs having been given yet another opportunity to amend their complaint, any inadequately pled claims in the SAC would be dismissed without further leave to amend.

For example, in *In re Anthem, Inc. Data Breach Litigation*, a case on which plaintiffs rely heavily, the plaintiff identified exactly what the defendant should have disclosed and alleged explicitly that if that information had been disclosed, he would have behaved differently. 2016 WL 3029783, at *35 (N.D. Cal. May 27, 2016); *see also In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1114 (N.D. Cal. 2015) (finding that plaintiffs had satisfied Rule 9(b) by alleging, *inter alia*, that they would have acted differently if they had known about the omission). Here, in contrast, plaintiffs offer no specific facts about the content of any particular alleged "omission," referring only in general terms to "side effects" of "medications" without specifying *what* alleged side effects should have been disclosed, whether those side effects were known at the time to the person who dispensed the medication, whether the disclosure would have been material to that plaintiff's decision to accept or reject the medication, and whether those side effects actually occurred and injured that plaintiff.

Indeed, although plaintiffs' claims focus on alleged failures to disclose information about medications, there is *only one* instance in which a plaintiff (Graham) identifies one occasion when he allegedly would have rejected a medication if additional information had been provided to him. And even in that case the SAC does not identify what information about the medication should have been disclosed; nor does it offer factual allegations that the medication received on that occasion caused that plaintiff injury. *See* Mot. at 10 (discussing SAC ¶ 271). No other plaintiff identifies any occasion when he would have refused to accept a medication if additional information had been provided.

These pleading gaps, which plaintiffs have had multiple opportunities to fill, cannot be excused by asserting that the relevant facts are peculiarly within defendants' knowledge. These are facts peculiarly within *plaintiffs'* knowledge. Nor can plaintiffs fill these gaps by arguing that "no reasonable person would ingest Medications in the volume and frequency pled if they were told that doing so could lead to the long-term negative medical problems that the Plaintiffs currently suffer." Opp. at 5. In the context of this case, this is a circular assertion that simply assumes the conclusion; it is particularly valueless in light of the fact that the SAC offers almost no allegations of fact tying any "long-term negative medical problems" allegedly suffered by plaintiffs to any medications they received.

Equally unavailing is plaintiffs' effort to parse the February 3 Order in an effort to show that the Court did not require pleading with particularity for the few claims that it deemed sufficiently pled.

Plaintiffs are wrong, for example, in suggesting that the Court did not require them to plead facts to establish a causal link between alleged wrongful conduct and their claimed injuries. *See* Opp. at 8. Contrary to plaintiffs' suggestion that the Court did not require a causal connection for plaintiff Graham's claim against the Chargers, the Court found that Graham had pled injury flowing directly from having played "all but 'one or two games'" during the 2000 season with "a broken transverse process in his back." Feb. 3 Order at 15-16. Nothing in the Court's Order suggests – and plaintiffs cite no case that holds – that a plaintiff may seek to recover for "injuries" for which he does not plead any causal connection to wrongs committed by a defendant.

Finally, even if a relaxed standard did apply here, it could not possibly be more "relaxed" than the standard of Rule 8. Even under that standard, a plaintiff cannot rest on pure conclusory allegations; he must plead facts that establish each element of his claims. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Defendants' Motion has identified critical elements of each of the challenged claims for which supporting facts have not been pled at any level of detail. Plaintiffs have simply not responded to that showing. Although Rule 9(b) clearly governs the analysis here, plaintiffs' pleading is inadequate under the standard of Rule 8 as well.

II. The Court Should Grant Summary Judgment on the Time-Barred Claims.

In addition, or in the alternative, the Court should grant summary judgment on the basis of the statute of limitations. On this issue also, plaintiffs make virtually no effort to rebut the detailed showing in defendants' Motion.

A. Plaintiffs Rely On the Wrong Legal Standard for Determining When the Limitations Period Begins to Run.

The parties agree that Maryland law on the statute of limitations applies. Under that law, "[t]he dispositive issue in determining when a statute of limitations begins to run under the discovery rule is ascertaining when the plaintiff was put on notice that he may have been injured." *Arroyo v. Bd. of Educ. of Howard Cty*, 851 A.2d 576, 590 (Md. 2004). Undisputed facts demonstrate that each plaintiff was on such notice prior to May 2012.

As this Court previously recognized, plaintiffs' allegations "that the clubs pressured them to play and gave them medications to continue playing, that they thus did not fully heal from injuries, and that

the toll thereof on their health 'shortened' their NFL careers … are all of facts plaintiffs knew or should have known as soon as they occurred." Feb. 3 Order at 5. Similarly, this Court has recognized, "based on plaintiffs' own allegations … [that] the widespread practice of substance abuse to the detriment of players' health in the NFL w[as a] well-known realit[y] of the profession" when plaintiffs were playing. *Id.* at 5 (citing FAC at pp. 51-56); *see also* SAC ¶¶ 197-211 (alleging the then "well established" potential adverse health consequences from use of NSAIDs or opioids); *id.* ¶¶ 229-32 (alleging that a 2002 Study on the use of Toradol in the NFL reported that "Toradol has the potential for severe complications such as bleeding and renal damage").[4] And as demonstrated in the Motion (at 18-24), undisputed facts establish that all of the plaintiffs (other than Walker) have been experiencing pain from the injuries about which they now complain for many years, dating back to when they retired from the NFL.

Plaintiffs' Opposition does not dispute these material facts, which establish that they were on notice of their claims long before May 2012. Instead, plaintiffs argue that before March 2014 they were not aware – and reasonably could not have been aware – of a legal theory connecting those injuries to the misrepresentations or omissions that they now allege. But under Maryland law, triggering the statute of limitations does not require that a plaintiff know every element of his claim; nor does it require that he understand the specific cause or nature of the harm. A plaintiff need only have "actual knowledge (express or implied) of a possible harm." *Russo v. Ascher*, 545 A.2d 714, 717 (Md. Ct. Spec. App. 1988).[5]

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[4] Moreover, a survey of retired NFL players published in 2011, which was cited by plaintiffs' lawyers in their *Dent* complaint in this Court, proffered the very same injury theory that plaintiffs assert here: "[M]any injured players are able to play football only because of their use of prescription pain medications. Additionally, since these players often do not have sufficient time off during the NFL season to heal their injuries, they reinjure themselves. A cycle of injury, pain, and re-injury could lead to subsequent pain pill use during the NFL which in turn could result in later life disability [and] continued pain … ." Cottler, et al., *Injury, Pain, and Prescription Opioid Abuse Among Former NFL Players*, DRUG ALCOHOL DEPEND. July 2011, at 193 (Block Supp. Dec. Ex. 1). *See also Dent, et al. v. NFL*, No. 14-2324 (N.D. Cal. May 20, 2014), Dkt No. 1, ¶¶ 183-87 (discussing Cottler survey).

[5] *See also Lutheran Hosp. of Md. v. Levy*, 482 A.2d 23, 27 (Md. Ct. Spec. App. 1984) (claim accrued when plaintiff believed a wrong had occurred, "[e]ven though the 'wrong' she then thought existed … was not the 'wrong' ultimately established"); *Lumsden v. Design Tech Builders, Inc.*, 749 A.2d 796, 804

(continued…)

Plaintiffs concede that accrual of a cause of action "does not require actual knowledge on the part of the plaintiff; it may be satisfied if the plaintiff is on 'inquiry notice.'" Opp. at 14. Under Maryland law, inquiry notice exists, and a claim accrues, when a plaintiff has "knowledge of circumstances which would cause a reasonable person in the position of the plaintiff to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged cause of action." *Bank of N.Y. v. Sheff*, 854 A.2d 1269, 1275 (Md. 2004) (citations and internal marks omitted). In such circumstances, Maryland law charges the plaintiff with "notice of all facts which a diligent investigation would in all probability have disclosed if it had been properly pursued." *Moreland v. Aetna U.S. Healthcare, Inc.*, 831 A.2d 1091, 1095 (Md. Ct. Spec. App. 2003) (citation and alteration omitted).

Accordingly, plaintiffs misread (Opp. at 13) language from *McKenney v. United Bank*, 2010 WL 4923331, at *4 (D. Md. Nov. 29, 2010) that "for the statute of limitations to run [p]laintiffs 'must be aware that a tort has occurred, and not merely that an injury has occurred.'" Maryland law does not require that a plaintiff have actual knowledge of a specific tort; rather, "limitations begin to run when a plaintiff gains knowledge sufficient to prompt a reasonable person to inquire further." *Pennwalt Corp. v. Nasios*, 550 A.2d 1155, 1163 (Md. 1988). Thus, *McKenney* states that, in the context of a fraud-based claim, notice "means knowledge of circumstances that would cause a reasonable person in the plaintiff's position to undertake an investigation which, if pursued with reasonable diligence, would lead to knowledge of the alleged fraud." 2010 WL 4923331, at *3; *see also Quillin v. C.B. Fleet Holding Co.*, 328 F. App'x 195, 200 (4th Cir. 2009) ("Some uncertainty about the cause of an injury does not alleviate an individual of the responsibility to inquire. Holding otherwise would eviscerate the requirement of a reasonable investigation.").

There can be no genuine dispute that plaintiffs had knowledge prior to May 2012 of facts that would have led a reasonable person to investigate. By their own allegations, each plaintiff: (a) had

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(Md. 2000) ("[D]iscovery of the injury, and not the discovery of all of the elements of the cause of action …starts the running of the clock for limitations purposes.") (internal citations omitted).

received and taken "enormous amounts" of medications without being given any information about their risks or side effects; (b) had been pressured to take the medications to continue playing; and (c) was experiencing pain from injuries incurred after taking the medications. This is more than sufficient to establish inquiry notice for purposes of summary judgment. *See Bank of N.Y.*, 854 A.2d at 1275 (summary judgment appropriate if there is no "genuine dispute" that "the plaintiffs were on inquiry notice more than three years before their suit was filed"); *see also Quillin*, 328 F. App'x at 202 (summary judgment appropriate "where a reasonable trier of fact could reach only one conclusion concerning the point at which the limitations period began to run"); *Outman v. United States*, 890 F.2d 1050, 1053 (9th Cir. 1989) (same).[6]

B. Plaintiffs' Arguments Against Summary Judgment Are Unavailing.

Unable to establish any genuine dispute of *material* fact that they were at least on inquiry notice of their claims before May 2012, plaintiffs offer a litany of other arguments in an effort to avoid summary judgment. None has merit.

As a threshold matter, plaintiffs misstate the law on the burdens imposed by the discovery rule. The Opposition argues (at 13) that "Defendants would have to demonstrate that undisputed facts prove that, by May 2012, plaintiffs not only knew of their injuries, but that their injuries were caused by the Medications." But as plaintiffs' own authority makes clear, "[i]n cases where the 'discovery rule' may be applicable, *plaintiff* … has the burden of proving the applicability of the rule." *Edwards v. Demedis*, 703 A.2d 240, 251 (Md. Ct. Spec. App. 1997) (emphasis added); *see also Finch v. Hughes Aircraft Co.*, 469 A.2d 867, 893 (Md. Ct. Spec. App. 1984). As the Fourth Circuit explained in *Quillin*, once a

[6] As plaintiffs knew that they had ingested these medications while playing, and as the long-term risks of NSAIDs and opioid use were (according to plaintiffs) then well-established, there is also no disputed issue of material fact that any claim for medical monitoring would also be time-barred. Courts routinely find medical monitoring claims to be time-barred when the plaintiffs knew of their exposure and failed to bring suit within the applicable limitations period. *See, e.g.*, *Ball v. Union Carbide Corp.*, 385 F.3d 713, 722-23 (6th Cir. 2004); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 152-54 (3d Cir. 1998); *In re Burbank Environmental Litig.*, 42 F. Supp. 2d 976, 982 (C.D. Cal. 1998); *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1120 (N.D. Ill. 1998); *Harris v. Advance Process Supply Co.*, 2009 WL 1789545, at *9 (N.J. Super. Ct. App. Div. June 25, 2009).

defendant makes a properly supported motion for summary judgment, it falls to the plaintiff "to show that a factual dispute remain[s] as to whether he was on inquiry notice." 328 F. App'x at 201. Plaintiffs' Opposition identifies no evidence that creates a genuine dispute as to whether any plaintiff was unaware before May 2012 of circumstances that would have caused a reasonable person to undertake an investigation.[7] Instead, plaintiffs offer a series of unsupported and inapposite arguments.

First, it does not help plaintiffs to continue to label their injuries as "latent." A "latent" injury is one that is in an undetectable state. *See Harig v. Johns-Manville Prods. Corp.*, 394 A.2d 299, 305 (Md. 1978) ("[A] person incurring disease years after exposure cannot have known of the existence of the tort until some injury manifests itself."). Undisputed facts establish that each of the plaintiffs was experiencing pain before May 2012 from the same musculoskeletal injuries for which he seeks recovery here; indeed, in most cases, undisputed facts establish that the plaintiff and his lawyers had filed previous claims seeking relief for the same injuries. *See* Mot. at 18-24. Plaintiffs dispute none of these facts. These are not claims for "latent" injuries.[8]

The same is true for most of plaintiffs' alleged "organ injuries," such as Ashmore's kidney issues (detected in a blood test in 2009), Wunsch's Crohn's Disease (for which he sought disability and workers' compensation benefits before 2012), Harris's heart condition (experienced for decades), Killings' gall bladder (surgery in 2010), Goode's kidney deficiency (diagnosed in 2010), or Lofton's

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[7] If anything, the record evidence cited by plaintiffs reinforces the conclusion that each of them was aware of circumstances that would have put him on inquiry notice. *See, e.g.*, Sinclair Dec. Ex. 6, at 103:25-104:6, 291:5-9 (King's testimony that the lack of information about the medications provided to him by the Bills was different than his "prior experiences with medication" based "on the fact that I have gone to a doctor's office before [and] have seen how they administer medication, and those same type of practices that I have seen weren't followed when I played for NFL teams."); *id.* Ex. 2 at 115:6-20 (Wunsch's testimony that an athletic trainer told him "do not sue me personally for this" before providing him with a Vicodin tablet); *id.* Ex. 4 at 107:25-108:4 (Massey's testimony that veteran players told him "you need to stop taking that [medication]").

[8] Plaintiffs' assertions that certain injuries have "worsened" in recent years (*e.g.*, Opp. at 25) are irrelevant. *See Morris v. Minn. Mining & Mfg. Co.*, 2015 WL 1757465, at *4-5 (D. Md. Apr. 16, 2015) ("The fact that plaintiff's symptoms, neurological or otherwise, were not properly evaluated or diagnosed from the outset does not form a basis for tolling the limitations period."); *Harig*, 394 A.2d at 301 n.1 (Maryland courts have refused to adopt the "maturation of the harm" theory to the running of a limitations period).

elevated creatinine levels (diagnosed in 2009 or 2010). *See* Mot. at 18-24 (citing evidence).[9] Accordingly, even if any of these plaintiffs had stated a claim with respect to any of these injuries – and apart from Carreker, no plaintiff has offered allegations that would establish a causal nexus between any alleged wrongdoing that is pled with particularity and any "organ injury" – they are time-barred.

Second, plaintiffs argue (Opp. at 20) that "the injuries at issue in this case are not the injuries that plaintiffs sustained on the field ***as a result of playing football***" (emphasis in original). But earlier in the Opposition, plaintiffs identify as the "Resulting Damages" pled in the SAC the "constant pain" from injuries suffered while playing football. *See* Opp. at 6-8. The SAC alleges that each plaintiff "directly attributes" that pain "*to the injuries he suffered in the NFL* that were masked by the Medications, or the Medications themselves" (emphasis added). *E.g.*, SAC ¶ 246 (Massey, Lofton). Moreover, it is undisputed that, prior to May 2012, each of these plaintiffs sought disability benefits and/or workers' compensation benefits related to these same injuries, attributing them to their football employment. Mot. at 18-24. And if that were not enough, plaintiffs have now supplemented their Rule 26(a)(1)(A) damages disclosure to state, *inter alia*, that they seek to recover for "pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary injury" *beginning* on "the day on which that particular Named Plaintiff retired from the NFL." Block Supp. Dec. Ex. 2 at 43. In short, there is no genuine dispute that plaintiffs were suffering from the injuries about which they complain here well before May 2012 and have long attributed these injuries to their NFL careers.

Third, the Opposition argues (at 20) that "the ***cause*** of those injuries – the exorbitant amount of often illegally dispensed Medications – were [sic] not and could not have [sic] discovered in the exercise

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[9] Far from creating genuine fact disputes, plaintiffs' evidence actually supports defendants' showing. For example, although the Opposition challenges defendants' showing that Ashmore was on notice of his alleged kidney disease by at least 2010 (Opp. at 23-24), plaintiffs' proffered *evidence* includes Ashmore's testimony that in 2009 or 2010 a kidney specialist recommended that he see her for regular follow-up on his high creatine levels, but that he elected not to do so. Sinclair Dec. Ex. 1 at 182:5-22; *see also id.* at 188:2-5 (Ashmore acknowledging that he knew then of other NFL players who had kidney issues). In any event, Ashmore has not pled any causal nexus between this condition and the incident involving a broken wrist that forms the basis for the only claim he has otherwise pled with particularity. *See* Feb. 3 Order at 14. To the contrary, plaintiffs assert that "no doctor has told [Ashmore] that these injuries are linked to taking those Medications." Opp. at 23.

of reasonable diligence until shortly before Plaintiffs filed this lawsuit, after conferring with counsel." But plaintiffs point to no evidence that supports this assertion. Nor could they do so. Most of their alleged injuries are not asserted to be the result of side effects of medications; rather, they are alleged to stem from plaintiffs' enhanced ability to return to play because of the *expected and intended* impact of medications used to treat pain. *E.g.*, SAC ¶ 266 (Massey). Plaintiffs were clearly aware of the use of the medications for this purpose when it occurred. *See, e.g.*, Sinclair Dec. Ex. 8, at 303:14-17; *see also* Sinclair Dec. Ex. 10, at 165:1-17. Indeed, any ingestion of medications – whether in "enormous" amounts or not – could not have occurred without their knowledge.

Plaintiffs' alleged need for their counsel's guidance that the provision of medications in some situations was "illegal" is immaterial; under Maryland law, plaintiffs are "presumed to have had the knowledge of the law that would enable them to determine whether [defendants' actions] ha[ve] been wrongful." *Moreland*, 831 A.2d at 1097. In short, the only "fact" plaintiffs aver – that, until they talked to their current lawyers they were not aware of the legal theory for their cause of action – is not *material* to the statute of limitations. *See Levy*, 482 A.2d at 29 (cause of action accrues "when there are facts known… which would serve as the basis of an actionable claim, and not necessarily when the patient is informed by counsel that he has a cause of action") (quotation marks and citation omitted). If anything, the fact that each plaintiff claims to have become immediately aware of his claim after talking to the lawyers confirms that the only thing plaintiffs lacked before March 2014 was knowledge of the law.

Fourth, the Opposition argues (at 11) that plaintiffs' claims are not time-barred because of defendants' purported "concealment of their illegality." But it is not enough for plaintiffs just to *assert* that defendants were engaged in concealment; under Maryland law, plaintiffs must "prove that they did not discover the alleged wrong more than three years before they filed suit *and that this lack of discovery was not due to plaintiffs' unreasonable failure to exercise ordinary diligence.*" *Finch*, 469 A.2d at 892 (emphasis added). Each plaintiff must "definitively allege and prove not only the fact of ignorance, but also the time when the fraud, misrepresentation or concealment was discovered; why he was ignorant of his rights so long; and how he discovered the fraud, misrepresentation or concealment." *Piper v. Jenkins*, 113 A.2d 919, 924 (Md. 1955); *see also Doe v. Archdiocese of Wash.*, 689 A.2d 634, 643 (Md. Ct. Spec. App. 1997) (plaintiff claiming fraudulent concealment must specifically allege and

prove "how the fraud kept [them] in ignorance of a cause of action, how the fraud was discovered, and why there was a delay in discovering the fraud, despite the plaintiff's diligence").

The SAC and the Opposition do none of these things. The SAC alleges only in conclusory fashion that each plaintiff did not "become aware that Defendants caused [his] injuries until, at the earliest, March of 2014." SAC ¶¶ 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39. There are no particularized allegations of either fraudulent concealment or diligence; nor have plaintiffs made any effort to carry their burden under Rule 56 of presenting evidence on these points. The Opposition argues that plaintiffs could not have discovered their claims until they talked with their lawyers, but nowhere in either the SAC or the Opposition are any *facts* alleged, let alone supported with admissible evidence, demonstrating how the alleged "fraud" was discovered, why there was a delay in discovery, and what diligence, if any, each plaintiff expended in investigating the cause of his injuries before speaking with counsel in 2014 – let alone how claims of concealment can be squared with plaintiffs' filing of workers' compensation or disability claims years earlier for the same injuries that they assert here. *See Piper*, 113 A.2d at 924 (affirming grant of judgment on the pleadings when plaintiffs did "not specifically allege how plaintiffs made the discovery of the fraud, and why they did not make the discovery sooner than they did" and complaint was "entirely lacking in any specific averment as to what diligence plaintiffs exercised to discover the fraud"); *Dual Inc. v. Lockheed Martin Corp.*, 857 A.2d 1095, 1106-07 (Md. 2004) (affirming summary judgment where plaintiff failed to demonstrate compliance with its "duty … to conduct a diligent investigation").

Fifth, plaintiffs argue that "there is no evidence that any of Defendants' doctors – or the Workers' Compensation or NFL disability doctors – ever told the Plaintiffs that the Medications could have had any relation" to their injuries. Opp. at 19; *see also* Opp. at 21 ("Most of the Plaintiffs have still ***never*** been told by a doctor that the Medications could have caused their injuries."). While this assertion raises a serious question about the merits of these claims, it does not raise a genuine dispute of material fact as to the running of the statute of limitations.[10] No plaintiff asserts that he *asked* a doctor

[10] As one Maryland court observed when confronted by a similar argument, under plaintiffs' view, "all the historical facts pertaining to an injury could occur, the claimant could be well aware that [he] had (continued…)

whether his condition could be related in any way to the medications that he received while playing football, much less that he did so and received a negative answer.[11] Accordingly, this case is not at all like *Wagner v. Allied Chemical Corp.*, 623 F. Supp. 1407 (D. Md. 1985), in which plaintiffs exposed to pesticides were affirmatively told by doctors that their injuries were not related to the chemicals.[12]

In sum, there can be no genuine dispute that these claims are time-barred.

CONCLUSION

For the reasons stated above and in defendants' opening Memorandum, the Court should grant dismissal with prejudice and/or enter summary judgment on plaintiffs' claims as set forth in the Proposed Order submitted with the Motion (Dkt. No. 191).

DATED: April 13, 2017

Respectfully submitted,

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been injured, but no cause of action would accrue until, perhaps decades later, an expert concluded that the physical harm had been the result of [a tort]. We do not think the discovery rule countenances that." *Levy*, 482 A.2d at 29; *see also Pennwalt Corp.*, 550 A.2d at 1167 (the "knowledge" required to trigger the statute of limitations is not "clear and unequivocal proof" that a specific tort has occurred).

[11] No genuine dispute of material fact is created by plaintiffs' assertion that they "trusted" team doctors. No plaintiff has submitted evidence that any team doctor prevented him from investigating any potential claim while playing, let alone that he was prevented from investigating a claim after he retired. *See Brown v. United States*, 353 F.2d 578, 580 (9th Cir. 1965) ("We cannot accept the proposition that one … [is] excused from conducting diligent inquiry into the conduct of a doctor with whom the personal relationship has been terminated and who is not claimed to have acted in direct concert with the succeeding physician."); *see also* Sinclair Dec. Ex. 7 at 177:18-23 ("Q. None of the clubs you played for in the NFL stopped you from seeing a doctor once you left the league; is that fair to say? … A. Once I was no longer playing football, they had no control over what I did.").

[12] For the same reason, this case is different from *Degroft v. Lancaster Silo Co.*, 527 A.2d 1316 (Md. Ct. Spec. App. 1986), a suit about the construction of a silo in which the defendant's agents made repeated inspection visits to the silo and told the farmer nothing was wrong with it. *Id.* at 1325. It also differs from *Baysinger v. Schmid Products Co.*, 514 A.2d 1 (Md. Ct. Spec. App. 1987), in which the plaintiff in a product liability lawsuit asked a doctor whether a contraceptive device could be the cause of her infection and was affirmatively told that he had "no way of determining" whether it was. *Id.* at 4. There is no similar showing here that plaintiffs diligently investigated their claims.

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EXHIBIT A

Group 1: Previously Dismissed Claims as to Which There Has Been No Material Change in the SAC (Mot. at 6-9)

Plaintiff/Defendant	SAC ¶	Discussion in Opposition	Summary Judgment Sought in the Alternative?
Massey/ARZ	246	None	Yes
Massey/JAC	260	None	Yes
Massey/NYG	267	None	Yes
Sadowski/ATL	247	None	Yes
Sadowski/KCC	261	None	Yes
Sadowski/NYJ	268	None	Yes
Sadowski/PIT	271	None	Yes
Goode/IND	259	Page 6	Yes
Wunsch/TBB	275	None	Yes
Lofton/CAR	250	None	Yes
Lofton/NEP	265	None	Yes
Killings/SF	273	None	Yes

Group 2: Previously Dismissed Claims That Have Been Amended But That Still Fail to Cure the Pleading Inadequacy (Mot. at 9-14)

Plaintiff/Defendant	SAC ¶	Discussion in Opposition	Summary Judgment Sought in the Alternative?
Evans/BAL	248	Page 6	Yes
Evans/MIN[1]	264	Page 6	Yes
King/BUF	249	Page 7; listed on page 11 but not discussed	Yes
King/DET	256	Listed on page 11 but not discussed	Yes

[1] Omitted from Plaintiffs' Exhibit 1 list of claims

King/TEN	276	Listed on page 11 but not discussed	Yes
Sadowski/CIN	252	Page 7; listed on page 11 but not discussed	Yes
Ashmore/LAR	262	Page 6; listed on page 11 but not discussed	Yes
Ashmore/WAS	277	Listed on page 11 but not discussed	Yes
Lofton/ARZ	246	Page 7	Yes
Harris/BAL[2]	253	Listed on page 11 but not discussed	Yes
Harris/DAL	254	None	Yes
Graham/CHI	251	Listed on page 11 but not discussed	Yes
Graham/NYJ	268	Listed on page 11 but not discussed	Yes
Graham/PHI	270	Listed on page 11 but not discussed	Yes
Graham/PIT	271	None	Yes
Killings/HOU	258	None	Yes
Walker/ARZ	246	None	No

Group 3: Claims for Which Only Summary Judgment is Sought

Plaintiff/Defendant	**SAC ¶**
Massey/DET	256
Massey/NOS	266
Ashmore/OAK	269
Wunsch/SEA	274
Harris/MIA	263
Graham/SD	272

[2] Incorrectly identified as Cleveland

Killings/MIN	264
Carreker/GB (except for heart condition)	257
Carreker/DEN (except for heart condition)	255

Group 4: Claims Not Addressed in the Pending Motion

Plaintiff/Defendant	**SAC ¶**
Carreker/DEN (heart condition)	255
Carreker/GB (heart condition)	257
Walker/SD	272